



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
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ATLANTA, GEORGIA 30303-8960

MAR 27 2018

Mr. Tom Frick
Director
Division of Environmental Assessment and Restoration
Florida Department of Environmental Protection
Mail Station 3000
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Dear Mr. Frick:

The United States Environmental Protection Agency has completed its review of the revisions adopted as part of the State's Triennial Review and contained in rule 62-302.530(46). All of the Triennial Review revisions were considered and approved for adoption by the Florida Environmental Regulation Commission (ERC) at a public hearing on December 9, 2015. Florida Department of Environmental Protection (FDEP) subsequently filed the amendments for adoption with the Florida Department of State on January 28, 2016. The rule amendments took effect on February 17, 2016. On June 14, 2016 the EPA received a letter from Frederick L. Aschauer, Jr., General Counsel of Florida Department of Environmental Protection to Ms. Heather McTeer Toney, Regional Administrator, U.S. EPA Region 4, dated June 7, 2016 certifying that the amendments were duly adopted pursuant to state law. The majority of these revisions were approved by the EPA on July 24, 2017.

As laid out in the enclosed decision document, titled *Decision Document of the United States Environmental Protection Agency Determination Under Section 303(c) of the Clean Water Act Review of a Portion of Florida's 2015 Triennial Review: Changes to Rule 62-302.530(46)*, the EPA is approving revisions to add saltwater nonylphenol criteria.

In addition to the EPA's review pursuant to Section 303 of the Clean Water Act, Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS), to ensure that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of designated critical habitat of such species. The Agency's decision to approve nonylphenol provisions is subject to the results of the consultation under Section 7 of the ESA. The Agency is including the results of the Section 7 consultation in this letter.

USFWS concurred with EPA's determination of "may affect, not likely to adversely affect" and "no effect" for ESA-listed endangered and threatened species and their designated critical habitat in Florida with a letter on February 9, 2017. The consultation on the saltwater nonylphenol criteria with NMFS was completed with a final biological opinion (BO) on February 28, 2018. The BO concluded that approval of these standards is not likely to jeopardize any ESA-listed species under the NMFS' jurisdiction that occur in Florida, except coral species. NMFS' opinion states that the proposed action is likely to adversely affect, but not likely to jeopardize the continued existence or recovery of elkhorn coral, staghorn coral, rough cactus coral, pillar coral, lobed star coral, mountainous star coral, and

boulder star coral. The NMFS also concluded that the approval of the standards is not likely to destroy or adversely modify designated critical habitat under NMFS' jurisdiction that occurs within Florida. The analysis completed by the NMFS to reach this conclusion is found in the attached BO.

Also, included in the BO are the NMFS' required reasonable and prudent measures (RPMs). The measures are nondiscretionary and must be undertaken by the EPA. The ESA requires that when a proposed agency action is found to be consistent with Section 7(a)(2) of the ESA and the proposed action may incidentally take individuals of ESA-listed species, the NMFS will issue a statement that specifies the impact of any incidental taking of endangered or threatened species. To minimize such impacts, RPMs and terms and conditions to implement the measures must be provided.

The first RPM requires the EPA to inform FDEP that the EPA is approving the 4-nonylphenol criteria, including the application of the criterion of 1.7 micrograms per liter for predominantly marine waters in waters where ESA-listed corals occur or may recolonize. However, according to the findings of the BO, exposures to 4-nonylphenol at or below the proposed criterion of 1.7 micrograms per liter for predominantly marine waters may adversely affect ESA-listed coral species under NMFS jurisdiction. If data become available suggesting that exposure to 4-nonylphenol at the criterion of 1.7 micrograms in predominantly marine waters is likely to adversely affect ESA-listed corals under NMFS jurisdiction, the EPA will reinstitute consultation with NMFS on these effects. As such, EPA's approval does not foreclose either the formulation by NMFS or the implementation by the EPA of any alternatives that might be determined in the reinstituted consultation to be needed to comply with Section 7(a)(2).

Also, in the first RPM, the EPA will use its authorities to ensure that a 4-nonylphenol criterion that minimizes take of ESA-listed coral species is applied and implemented in waters where these species occur or may recolonize. EPA requires that effluent limitations for industries that use 4-nonylphenol and nonylphenol ethoxylates and discharge into a mixing zone that includes coral reef habitat include an end-of-pipe restriction for 4-nonylphenol at 1.7 micrograms per liter.

In the second RPM, the EPA will ensure that the extent of incidental take is not exceeded through monitoring 4-nonylphenol in waters where ESA-listed corals occur or may recolonize. Unauthorized take of ESA-listed species is prohibited under Section 9 of the ESA and this prohibition applies to all individuals, organizations, and agencies subject to United States jurisdiction. In the BO, authorized take of ESA-listed coral species will have been exceeded if nonylphenol is found to occur in Florida Reef Tract waters at concentrations above the 1.7 µg 4-nonylphenol per liter, using appropriately sensitive methodology (i.e., ASTM¹ method D7485-09), when concentrations are below 5 µg/L. Monitoring data for nonylphenol are required to determine whether take covered by this opinion has been exceeded, and the EPA will need to report the results of monitoring to NMFS.

The EPA strongly encourages FDEP to design and implement, within the next 18 months, an effective monitoring program for the Florida Reef Tract using an analytical method that can quantify 4-nonylphenol at the criterion in order to establish whether waters where ESA-listed corals occur or may recolonize comply with the criterion and proceed accordingly. FDEP should coordinate with NOAA coral experts in the design of this monitoring program. The monitoring program will:

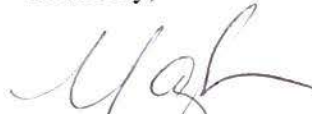
¹ American Society for Testing and Materials

- (a) Sunset when 4-nonylphenol concentrations are demonstrated to be at or below the criterion or are achieved in cases where water quality is impaired (since nonylphenol production and use is being phased out).
- (b) Include periodic, adaptive monitoring to detect whether previously undiscovered discharges to these waters are occurring.
- (c) Include a monitoring trigger if a new discharge or significant new use is authorized.

If within three years, FDEP does not establish a program and initiate the monitoring described above, the EPA will work with NMFS to design a monitoring program that will enable them to ensure that take is not exceeded.

We would like to commend you and your staff for your continued efforts in environmental protection for the State of Florida, particularly your pre-adoption coordination efforts with our office and the Services. Should you have any questions regarding the EPA's action today, please contact me at (404) 562-9469 or have a member of your staff contact Dr. Katherine Snyder, Florida Water Quality Standards Coordinator at (404) 562-9840.

Sincerely,



Mary S. Walker
Director
Water Protection Division

Enclosures

cc: Mr. Robert Williams, FDEP
Dr. Pat Shaw-Allen, NMFS
Ms. Cathy Tortorici, NMFS
Mr. Donna S. Wieting, NMFS

**Decision Document of the United States Environmental Protection Agency Determination Under
Section 303(c) of the Clean Water Act Review of a Portion of Florida's 2015 Triennial Review:
Changes to Rule 62-302.530(46)**

In a letter dated June 7, 2016 from Frederick L. Aschauer, Jr., General Counsel for Florida Department of Environmental Protection (the FDEP or the Department), to Heather McTeer Toney, Regional Administrator of the U.S. Environmental Protection Agency's Region 4 Office, the state of Florida submitted new and revised water quality standards for review by the EPA pursuant to Section 303(c) of the Clean Water Act (CWA or Act). In the June 7, 2016 letter, the General Counsel certified that the WQS revisions were duly adopted pursuant to Florida law. These new and revised water quality standards (WQS) are set out primarily in rule 62-302 of the Florida Administrative Code (F.A.C.) [Surface Water Quality Standards]. The State also submitted amendments to rule 62-303, F.A.C. [Identification of Impaired Surface Waters], which establishes the state of Florida's methodology for assessing whether waters are attaining state WQS, and rule 62-4, F.A.C [Permits], which, in part, sets out the state of Florida's antidegradation implementation procedures. The majority of these revisions were approved by the EPA on July 24, 2017.

As discussed more fully below, where the EPA has determined that the remaining amendments to rule 62-302 are, themselves, new or revised water quality standards, the EPA has reviewed and approved those revisions pursuant to Section 303(c) of the CWA.¹

Clean Water Act Requirements

Section 303(c) of the CWA requires states to establish WQS and to submit any new or revised standards to the EPA for review and approval or disapproval. WQS describe the desired condition of a waterbody and consist of three principal elements. CWA Section 303(c)(2).

States first identify the "designated uses" of the state's waters, such as public water supply, recreation, propagation of fish, or navigation. 40 C.F.R. § 131.10. These designated uses are based on both the actual and potential uses of the waterbody. 40 C.F.R. §§ 131.3(f), (i); 131.10.

The second element of state WQS are a set of criteria that protect the designated use. 40 C.F.R. § 131.11. Such criteria must be based on a sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. 40 C.F.R. § 131.11(a). For waters with multiple use designations, the criteria must support the most sensitive use. The EPA's regulations also require that, in establishing criteria, a state shall consider WQS of downstream waters and shall ensure that its WQS provide for the attainment and maintenance of WQS of downstream waters. See 40 C.F.R. § 131.10(b). A state's submission of water quality criteria must include, among other things, (1) the methods used and analyses conducted to support WQS revisions, (2) water quality criteria sufficient to protect the designated uses and (3) a certification by the State Attorney General or other appropriate legal authority within the state that the WQS were duly adopted under state law. 40 C.F.R. § 131.6.

Finally, the EPA's regulations require states to adopt a statewide antidegradation policy that limits degradation of state waters and to identify its methods for implementing their antidegradation policies. 40 C.F.R. § 131.12.

¹ The EPA has provided FAQs on "What is a New or Revised Water Quality Standard Under CWA 303(c)(3)?" at <http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm>. The link provides detailed information of such analysis.

Endangered Species Act Requirements

In addition to the EPA's review under Section 303 of the CWA, Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), to ensure that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of designated critical habitat of such species. With regard to consultation activities for Section 7 of the ESA, the EPA Region 4 concluded that the WQS being approved by the Agency would either have no effect or may affect, but not likely to adversely affect, threatened and endangered species or their designated critical habitat. The results of the ESA consultation are included in the discussion below with each revision.

The EPA's Decision Summary

Each of the state of Florida's WQS revisions addressed by this action is addressed in detail below along with the EPA's analysis and conclusions. The state of Florida's revisions to their water quality standards are shown below with additions to rule language presented with underlined text and removals from rule language presented with a strike-out text.

Revisions to Chapter 62-302² Surface Water Quality Standards

Subsection 62-302.530(46)

Subsection 62-302.530(46) [Nonylphenol (4-nonylphenol)] was added and reads as follows:

Parameter	Units	Class I	Class II	Class III and Class III-Limited (see Note 4)		Class IV	Class V
				Predominantly Fresh Waters	Predominantly Marine Waters		
(46) <u>Nonylphenol</u> (4- <u>nonylphenol</u>)	<u>Micrograms/</u> <u>L</u>	<u>< 6.6</u>	<u>< 1.7</u>	<u>< 6.6</u>	<u>< 1.7</u>		

Before this revision, the state of Florida did not have criteria for nonylphenol in saltwaters. In this revision, the state of Florida is adopting the EPA's national recommended criteria for nonylphenol (EPA 2005)³. The state of Florida is adopting the saltwater chronic criterion recommendation as a never to exceed value in their criteria, which is a more stringent criterion than the national recommendation. This application of the EPA's recommended chronic magnitude value will be more protective to aquatic life.

² Unless otherwise stated, all rule and subsection citations are to provisions in the Florida Administrative Code.

³ EPA. 2005. *Aquatic Life Ambient Water Quality Criteria – Nonylphenol*. Office of Water. Washington, DC. EPA 822-R-05-005.

Considering the scientific and technical information supporting the 304(a) recommendations, the EPA has determined that the changes to Subsection 62-302.530(46) Class II and Class III saltwaters protect the state of Florida's designated uses and, therefore, are consistent with CWA Section 303(c) and 40 C.F.R. § 131.11. These changes to saltwater criteria are approved by the EPA under CWA Section 303(c). The freshwater criteria were approved under separate cover dated July 24, 2017.

For Endangered Species Act Section 7(a)(2) consultation requirements, these revisions to saltwater criteria were determined to have no effect or may effect, but not likely to adversely affect, endangered species or their critical habitat under the FWS jurisdiction. Informal consultation was initiated with FWS and NMFS on January 26, 2017 and concurrence from USFWS was received on February 9, 2017. The EPA received a non-concurrence letter from NMFS on August 7, 2017. On August 31, 2017 the EPA sent a letter to NMFS requesting formal consultation on the nonylphenol criteria.

The formal consultation on the saltwater nonylphenol criteria with NMFS was completed with a final biological opinion (BO) on February 28, 2018. The BO concluded that approval of these standards is not likely to jeopardize any ESA-listed species under the NMFS' jurisdiction that occur in Florida, except coral species. NMFS' opinion states that the proposed action is likely to adversely affect, but not likely to jeopardize the continued existence or recovery of elkhorn coral, staghorn coral, rough cactus coral, pillar coral, lobed star coral, mountainous star coral, and boulder star coral. The NMFS also concluded that the approval of the standards is not likely to destroy or adversely modify designated critical habitat under NMFS' jurisdiction that occurs within Florida.

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Also, in the first RPM, the EPA will use its authorities to ensure that a 4-nonylphenol criterion that minimizes take of ESA-listed coral species is applied and implemented in waters where these species occur or may recolonize. The EPA requires that effluent limitations for industries that use 4-nonylphenol and nonylphenol ethoxylates and discharge into a mixing zone that includes coral reef habitat include an end-of-pipe restriction for 4-nonylphenol at 1.7 micrograms per liter.

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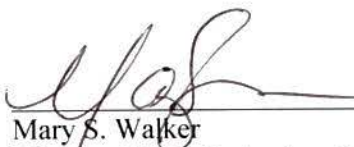
If within three years, FDEP does not establish a program and initiate the monitoring described above, the EPA will work with NMFS to design a monitoring program that will enable them to ensure that take is not exceeded.

Conclusions

Based on the reasons outlined above, the EPA concludes that the state of Florida's new or revised WQS meet the requirements of the CWA and 40 CFR part 131. The revised criteria addressed in this Decision Document are approved by the EPA pursuant to Section 303(c) of the Act.

MAR 27 2018

Date



Mary S. Walker
Director, Water Protection Division